

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

ZELLA MAYE FREEMAN,
Plaintiff,
v.
CITY OF FRESNO, R. GARRISON,
MARK A. YEE, J. CAPRIOLA, I.
BARRIMOND, J. HOLLINS, R.
PEREZ, A. SIMONSON, inclusive,
Defendants.

1:05-CV-0328 OWW SMS

**MEMORANDUM DECISION AND ORDER
DENYING DEFENDANTS' MOTION FOR
RECONSIDERATION**

1. INTRODUCTION

Defendants bring a motion for reconsideration of a denial of summary judgment as to Defendant Ian Barrimond ("Sergeant Barrimond"). A hearing on the motion for summary judgment was held on October 24, 2006. An order on the motion was issued on December 26, 2006. (Doc. 105, Memorandum Decision and Order Granting in Part, Denying in Part Defendants' Motion for Summary Judgment.) The underlying case involves Plaintiff Zella Maye Freeman's ("Freeman") allegations that Defendants were unreasonable in executing a valid search warrant in her home in violation of her Fourth Amendment rights.

2. PROCEDURAL BACKGROUND

On January 29, 2007 Defendants filed a motion for

1 reconsideration of the court's December 26, 2007 order on
2 Defendants motion for summary judgment. (Doc. 119-1, Defendants'
3 Motion for Reconsideration.) On February 16, 2007 Plaintiff
4 opposed the motion. (Doc. 120-1, Opposition.) On February 23,
5 2007 Defendants replied to Plaintiff's opposition. (Doc. 122,
6 Defendants' Reply.)

7 **3. STANDARD OF REVIEW**

8 "A motion for reconsideration of summary judgment is
9 appropriately brought under Rule 59(e)." *Backlund v. Barnhart*,
10 778 F.2d 1386, 1388 (9th Cir. 1985). A motion for
11 reconsideration is appropriate where the district court (1) is
12 presented with newly discovered evidence, (2) committed clear
13 error or the initial decision was manifestly unjust, (3) if there
14 was an intervening change in controlling law. See *School*
15 *District No. 1J, Multnomah County v. Acands, Inc.*, 5 F.3d 1255,
16 1263 (9th Cir. 1993). A reconsideration motion should not merely
17 present arguments previously raised, or which could have been
18 raised in the initial summary judgment motion. See *Backlund*, 778
19 F.2d at 1388 ("The motion was properly denied here because . . .
20 it presented no arguments that had not already been raised in
21 opposition to summary judgment."); *United States v. Navarro*, 972
22 F. Supp. 1296, 1299 (E.D. Cal. 1997)¹ ("[M]otions to reconsider
23 are not vehicles permitting the unsuccessful party to "rehash"
24 arguments previously presented... Nor is a motion to reconsider

25
26 ¹The underlying decision on the merits, *United States v.*
27 *Navarro*, 959 F. Supp. 1253 (E.D. Cal. 1997), was reversed by
28 *United States v. Navarro*, 160 F.3d 1254 (9th Cir. 1998), cert. denied 119 S. Ct. 2354, 144 L. Ed. 2d 249 (1999). This reversal did not affect the district court's denial of reconsideration.

1 justified on the basis of new evidence which could have been
2 discovered prior to the court's ruling....Finally, "after
3 thoughts" or "shifting of ground" do not constitute an
4 appropriate basis for reconsideration.").

5 **4. DISCUSSION**

6 **A. A Genuine Issue of Material Fact Exists As to Sergeant**
7 **Barrimond's Reasonableness in Giving the Command to Enter**
8 **Freeman's House.**

9 Defendants argue that there is no genuine issue of material
10 fact regarding the reasonableness of Sergeant Barrimond's conduct
11 in executing the warrant under the doctrine of qualified
12 immunity. In analyzing qualified immunity under the Fourth
13 Amendment, a court must first ask whether a constitutional
14 violation occurred at all. If the answer to this question is
15 yes, the court must then inquire whether the right violated was
16 "clearly established" by asking whether a reasonable officer
17 could believe that the defendant's actions were lawful. See
Saucier v. Katz, 533 U.S. 194, 201 (2001).

18 The traditional summary judgment approach should be used in
19 analyzing the first step of the *Saucier* analysis:

20 A court required to rule upon the qualified
21 immunity issue must consider, then, this threshold
22 question: Taken in the light most favorable to the
23 party asserting the injury, do the facts alleged show
the officer's conduct violated a constitutional right?
Where the facts are disputed, their resolution and
determinations of credibility are manifestly the
province of a jury.

24 *Wall v. County of Orange*, 364 F.3d 1107, 1110 (9th Cir. 2004)
25 (internal citations and quotations omitted). After this initial
26 inquiry, the court must then ask whether it would be clear to a
27 reasonable officer that his conduct was unlawful in the situation
28

1 confronted. Where the reasonableness of the officer's belief
2 that his conduct was lawful depends on the resolution of disputed
3 issues of fact... summary judgment is not appropriate." *Wilkins*
4 *v. City of Oakland*, 350 F. 3d 949, 956 (9th Cir. 2003).

5 Defendants argue that based on the undisputed facts in this
6 case, Plaintiff has not presented sufficient evidence to
7 establish an essential element of her case against Sergeant
8 Barrimond. However, on Defendants' motion for summary judgment,
9 the burden is not on Plaintiff to present evidence to establish
10 an essential element of the case. The burden is on Defendants to
11 show that there is no genuine dispute as to the facts in the
12 case. Fed. R. Civ. P. 56(c).

13 Defendants further argued that there is no genuine issue of
14 fact that Plaintiff suffered a constitutional harm by Sergeant
15 Barrimond's command to enter the residence in execution of the
16 valid search warrant. In support of their argument, Defendants
17 point out that the court noted the officers were in the middle of
18 gang territory, were waiting for a lengthy period of time before
19 the door was open, that Plaintiff questioned the officers'
20 presence, and that Sergeant Barrimond gave a reasonable command
21 to enter the residence. Defendants argue, as they did in their
22 motion for summary judgment, that Sergeant Barrimond's command
23 does not in any way make the service of the search warrant
24 unreasonable.

25 However, a factual dispute exists as to the circumstances
26 surrounding the entrance to Plaintiff's home that determines the
27 reasonableness of Sergeant Barrimond's decision to enter. At the
28 October 24, 2006 hearing on the motion for summary judgment

1 Defendants argued that Plaintiff refused to open the outer door
2 of her home to Officers and questioned the presence of police at
3 her doorstep. Defendants further argued that, given the length
4 of time the Officers waited, the rushed entry once Plaintiff
5 opened the outer door was reasonable. However, Plaintiff
6 provided a different factual account. Plaintiff claimed that the
7 Officers threatened to shoot her if she did not open the door.
8 Plaintiff further stated that she had difficulty opening the door
9 because she suffers from carpal tunnel syndrome and was
10 struggling with the lock as a result. Based on Plaintiff's
11 allegations, it could be inferred that the officers were not
12 waiting very long. Plaintiff contends she was endeavoring to
13 open the door and that the officers ignored her efforts by
14 threatening to shoot her. A court's role on summary judgment is
15 not to weigh evidence or resolve issues; rather it is to
16 determine whether there is a genuine issue for trial. See,
17 *Abdul-Jabbar v. G.M. Corp.*, 85 F.3d 407, 410 (9th Cir. 1996).

18 At the April 2, 2007 hearing on this motion for
19 reconsideration, several facts were clarified that bear on the
20 previous order to retain Barrimond in this litigation. Contrary
21 to the court's initial belief, no battering ram was used to enter
22 the residence. The officers did not break the door down upon
23 entry. Upon execution of the search warrant, Sergeant Barrimond
24 was not the officer who threatened to shoot Freeman. Sergeant
25 Barrimond did not touch Freeman upon entry and had no other
26 contact with her. However, Sergeant Barrimond did give the
27 command "let's go" and directed his team to enter the residence.
28 The reasonableness of this command depends on resolution of the

1 factual dispute between Plaintiff and Defendants. Defendants
2 argue that Plaintiff was taking too long to open the door and
3 that a quick entry was necessary. Plaintiff argues that due to
4 her carpal tunnel condition, she was unable to quickly open the
5 door, she communicated this information to the officers, and the
6 officers, nonetheless, conducted a forced entry, which she claims
7 was unnecessary as she sought to cooperate. Such facts, viewed
8 in the light most favorable to the non moving party, create a
9 triable issue of material fact as to Defendant Barrimond's
10 reasonableness.

11 **5. CONCLUSION**

12 Defendants' motion for reconsideration is **DENIED**.

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14 IT IS SO ORDERED.

15 Dated: May 3, 2007

16 /s/ Oliver W. Wanger
17 UNITED STATES DISTRICT JUDGE

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